Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36
	)	
	)	

COMMENTS

Penn Access Corporation ("Penn Access"), by its attorneys and pursuant to the Commission's Notice in this proceeding,[1] hereby submits its comments concerning the Commissions's characterization of all Competitive Access Providers ("CAPs") as "nondominant common carriers."[2]

I. Introduction and Summary

Penn Access is a CAP that utilizes fiber optic facilities in its offering of local access services to large business customers in and around Pittsburgh, Pennsylvania. Penn Access considers its activities to constitute private rather than common carriage. Thus, Penn Access takes the position that tariffing requirements

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[1] In the Matter of Tariff Filing Requirements for Nondominant Common Carriers, Notice of Proposed Rulemaking, CC Dkt. No. 93-36 (Feb. 19, 1993) ("Notice").

[2] Id. at note 30.

that apply to nondominant common carriers would not apply to its activities as a private carrier.

In these Comments, Penn Access asks the Commission to clarify that CAPs are not "common carriers" by definition, but rather that the traditional analysis of private versus common carriage remains the appropriate test for purposes of the Communications Act of 1934, as amended ("Act"), including the tariffing rules.[3]

II. The Notice Improperly Implies That All CAPS Are Common Carriers

In the Notice, the Commission announced that it was considering near-term changes to its permissive detariffing rules for nondominant common carriers.[4] In its policy findings regarding the beneficial effect that permissive detariffing has had on various service markets, the Commission states that "[s]ince their inception, CAPS have not been burdened by interstate tariff filing requirements."[5] The Notice goes on to state that, "[b]ecause CAPS have not been declared dominant in any Commission order, we consider them to be nondominant common carriers. See Application of Teleport Communications, New York, Memorandum Opinion and Order, File No. 13135-CF-TC-(3)-92, 7 FCC

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[3] See NARUC v. FCC, 533 F.2d 601 (D.C. Cir.), cert. denied, 425 U.S. 999 (1976) ("NARUC I").

[4] Those rules were recently held to be outside the Commission's authority in Amer. Tel. & Tel. v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

[5] Notice at para. 11.

Rcd 5986, 5987 (para. 14) (1992) (Teleport was described as a nondominant carrier)"[6] ("Teleport").

While Penn Access applauds the Commission's policy objective in this proceeding of minimal tariff regulation of nondominant common carriers, Penn Access is concerned that the Commission is broadening the definition of "common carrier" and ignoring the distinction between private and common carriage set forth in NARUC I and previous orders of the Commission.

In Teleport, the Commission addressed whether the telephone company-cable company cross-ownership prohibition of 47 U.S.C. § 613(b)(1) applied to prevent Teleport from being owned by Cox Cable Company because Teleport, a CAP, apparently held itself out as a common carrier providing local exchange switched telephone services throughout New York state. The Commission held that the prohibition was limited to "traditional landline local exchange telephone companies with monopoly control of bottleneck facilities."[7] Thus, the issue of whether a CAP is by definition a common carrier was never addressed in Teleport. Stated

[redacted]

III. The Notice Is Contrary to NARUC I and the Commission's Previous Recognition of the Test for Common Carriage

The Commission has previously addressed the issue of common carriage versus private carriage. For instance, in In re Lightnet and Section 214 Application to Construct Fiber Optic System in Florida as Part of An Interstate Network, FCC Rel. No. 85-276 (1985) ("Lightnet"), the Commission specifically approved the principles of NARUC I:

> In determining whether a service may be offered on a non-common carrier basis, [NARUC I] requires the Commission to consider (1) whether it should impose any "legal compulsion" upon a regulatee to serve the public indifferently; and (2) if not, whether there are reasons implicit "in the nature of the service to expect an indifferent holding out to the eligible user public." (Citations omitted.)[8]

To the extent that the Notice implies that all CAPs are now treated as common carriers, the Commission would improperly characterize the activities of CAPs that are private carriers and would thereby ignore previous orders, such as Lightnet.[9]

In Lightnet and Norlight I and II, the Commission set forth the following factors it considered in determining that the activities of carriers were not common carrier activities:

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[8] Lightnet at para. 3.

[9] See also In the Matter of Norlight; Request for Declaratory Ruling, 2 FCC Rcd 132 (1987) ("Norlight I"), aff'd In the Matter of Norlight; Request for Declaratory Ruling, 2 FCC Rcd 5167 (1987) ("Norlight II"); Satellite Business Systems, 95 FCC 2d 866 (1983); Tel-Optik, Ltd. et al., Memorandum Opinion and Order, 50 Fed. Reg. 14,761 (April 15, 1985); First Report and Order, Docket No. 83-426, 50 Fed. Reg. 13,338 (April 4, 1985).

(1) Establishment of medium-to-long term contractual relations with a relatively stable clientele;

(2) Tailoring of offerings to the special requirements of each customer;

(3) Negotiation of individual contracts;

(3) Contracting only with customers whose requirements would be compatible with the unique characteristics of the network;

(4) Insufficient market power to justify treatment as a common carrier; and

(5) Dealing with sophisticated users capable of protecting

applies to determine whether the activities of a CAP constitute common carriage or private carriage.

Respectfully submitted,

PENN ACCESS CORPORATION

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